IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 211 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

ELECON ENGINEERING CO LTD - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

==========

Appearance :
MR RK PATEL for Applicant(s) : 1,
MR BB NAIK for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Present Reference is at the instance of the assessee on the following questions for the opinion of this Court;

1. *Whether on the facts and in the circumstances of the case the Tribunal was justified in confirming the disallowance of Rs. 38181/- being 15% of brokerage amount of Rs. 254550/- by holding that the said amount was covered by the definition of 'interest' as provided in section 2 (28A) of the I.T. Act, 1961 ?*

2. *Whether on the facts and in the circumstances of the case the Tribunal was justified in confirming the disallowance of Rs. 35731/- u/s. 37(2A) of the Act without appreciating that Explanation ? to the said section provided for allowance in case of expenditure incurred in case of employees, and admittedly in the case of assessee the managing directors and senior managers had incurred the expenses in question ?*

5. *Whether on the facts and in the circumstances of the case the Tribunal was justified in law in confirming the*

disallowance of depreciation of Rs. 1195531/- and investment allowance of Rs. 796887/- on enhanced cost of plant and machinery due to variation in exchange rate ?

6. *Whether on the facts and in the circumstances of the case the Tribunal can be said to be justified in law in reading and interpreting provisions of section 43A of the Act to mean that only the exchange fluctuation relatable to previous year could be taken into consideration and over-looking the fact that what was required to be varied as 'actual cost' as defined u/s. 43 r.w.s.43A of the Act ?*

7. *Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that though the actual cost of the plant and machinery stands revised, the necessary effect thereof could not be given in so far as depreciation and investment allowance are concerned even though the figure on which the same are to be worked out has under gone changed-actual incurring of cost being relatable*

to the year of acquisition of plant and machinery in question ?

8. *Whether on the facts and in the circumstances of the case the Tribunal is justified in law in confirming the finding of lower authorities that the assessee company was not entitled to additional depreciation on the lift and photocopier machine ?*

9. *Whether on the facts and in the circumstances of the case the Tribunal was justified in law in confirming the disallowance of Rs. 88128/- being operational charges paid to Kanisha Steels and Rs. 9216/- being operational charges paidi to Western Metal Caps (P) Ltd. only on the ground that the system of accounting followed by the assessee was mercantile and that the payments in question related to earlier years, ignoring the fact that the bills in question had been received only during the accounting year in question and thus the liability had accrued only during the relevant accounting period ?*

10. *Whether on the facts and in the*

circumstances of the case, the Tribunal having found as a matter of fact that the expenses in relation to operational charges related to A.Y. 1983-84 could have declined to issue necessary directions to allow the same, especially when that was the base for disallowing the same in the year under consideration ?"

2. At the opening of the argument, learned counsel for the assessee submits that he be allowed not to press Questions No. 2, 5, 6 and 7 and the present matter be confined to Questions No. 1, 8, 9 and 10 only.

3. In respect of the first question, learned counsel submitted that the Commissioner of Income Tax (Appeals) had erred in upholding the disallowance of 15% of brokerage paid for obtaining loan under Section 40A(8). According to him, from the definition of 'interest' as contained in Section 2(28A), it would clearly appear that the word "interest" means 'interest' payable in any manner in respect of any money borrowed or debt. According to him, when no interest is paid and it was only brokerage, then the disallowance of 15% would be illegal. On the other hand, Mr. Naik, learned counsel for the

Revenue submits that Section 2(28A) clearly provides that the definition is inclusive and the term 'interest' includes any service fee or other charge in respect of the monies borrowed or debt incurred in respect of any credit facility which has not been utilised. According to him, if any brokerage is paid for obtaining the loan, then the said brokerage in fact would be service charge/service fee and such amount is required to be disallowed. In our opinion, a simple reading of Section 2(28A) would make it clear that service fee which could be termed as 'brokerage' would fall within the definition of the term 'interest', and the Commissioner of Income Tax (Appeals) was justified in upholding the disallowance of 15% of brokerage paid for obtaining loan under Section 40A(8) of the Act.

4. For Question No.8, it was submitted that the Assessing Officer was obliged to grant additional depreciation and extra shift allowance (ESA) on the assets, namely lift and photocopy machine. The authorities under the Act and the Tribunal have found, as a fact, that the lift was a passenger lift and was not exclusively used for lifting the goods and it also did not form part of the plant and machinery and therefore no claim for additional depreciation or Extra Shift Allowance was

maintainable. It could also not be disputed before us that the photocopy machine would not be part of plant and machinery and it is an equipment used in the office. If that be so, the Tribunal was justified in rejecting the claim.

5. After arguing for some time, in relation to Questions No. 9 and 10, when the learned counsel was confronted with observations made by the C.I.T. (A) in Paragraph No.33 of his order, the learned counsel submitted that he be allowed not to press the Questions No. 9 and 10 also. Permission is granted. The Reference is answered against the assessee. The Reference stands disposed of accordingly. No costs.

[R.S. Garg, J.]

[M.R. Shah, J.

RMR.